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Supreme Court, U.S.
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No. 93-117

In The

Supreme Court of the United States

October Term, 1993

BRIAN K. BRISCOE,

Petitioner,

v.

DEVALL TOWING & BOAT SERVICE OF HACKBERRY, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT, DEVALL TOWING & BOAT SERVICE OF HACKBERRY, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether the opinion of the Fifth Circuit Court Of Appeals is consistent with established precedent in holding that a Jones Act seaman has not suffered a compensable injury when his emotional injuries are accompanied by no more than trivial physical injury.

PARTIES TO THE PROCEEDINGS AND DESIGNATION OF CORPORATION RELATIONS

The parties to these proceedings are petitioner, Brian K. Briscoe, an adult citizen and resident of the State of Louisiana and Respondent, DeVall Towing and Boat Service of Hackberry, Inc., a privately held corporation. DeVall Towing and Boat Service of Hackberry, Inc. has no parent companies or subsidiaries.

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For The Fifth Circuit**

RESPONDENT, DEVALL TOWING & BOAT SERVICE OF HACKBERRY, INC.'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On September 9, 1991, petitioner, Brian K. Briscoe, (hereinafter referred to as "petitioner") filed a complaint in the United States District Court, Western District of Louisiana. Jurisdiction of the complaint was based upon Section 33 of the Merchant Marine Act, i.e. the Jones Act, as well as general maritime law. The complaint alleged that petitioner, while working in the course and scope of his employment with respondent, Devall Towing & Boat Service of Hackberry, Inc., (herein referred to as "respondent") sustained serious and disabling injuries as the

result of the negligence of respondent. Petitioner alleged that respondent's negligence included "the unseaworthy conditions of subject vessel, its gear, appurtenances, and unsafe working conditions; insufficient crew and due to the failure of [respondent] to provide [petitioner] with a safe place in which to work."

Following discovery, respondent filed a Motion for Summary Judgment arguing that there was no genuine issue of material fact and that petitioner was precluded by law from recovering for his emotional injuries.

Following oral argument, the district court entered an Order and Memorandum Ruling granting Respondent's Motion for Summary Judgment. (Pet. App. A-3) The lower court held that based on the Fifth Circuit decisions in *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1984), *Plaisance v. Texaco*, 966 F.2d 166 (5th Cir. 1992) and *Ainsworth v. Penrod Drilling Corporation*, 972 F.2d 546 (5th Cir. 1992), a plaintiff may not recover for purely emotional injury without accompanying non-trivial physical injury. The lower court stated "[e]ven accepting the facts in the light most favorable to this plaintiff, he could not recover for his emotional injuries; for, at most, his injuries are trivial." (Pet. App. A-7) Petitioner filed a Notice of Appeal with the Fifth Circuit Court of Appeals. On April 20, 1993, the Fifth Circuit affirmed the lower court's decision and subsequently denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. (Pet. App. A-1, A-14)

Petitioner graduated from LaGrange High School in Lake Charles, Louisiana in 1980. After attending Sowela Technical School for a year or two, petitioner performed

construction work, but then chose to work on tugboats. He worked for Darrow Fleeting and Switching Company for approximately two years. Petitioner began working for Darrow as a deckhand and was later promoted to a fleet mate, a position in which he took care of a fleet of barges.

In early 1986, petitioner was employed by respondent where he worked continuously until July, 1991. From 1986 until 1991, petitioner was a deckhand, a tankerman and ultimately a pilot assigned to the M/V MAR-RAY. The M/V MAR-RAY is a 55 foot long, 16-1/2 foot wide pushboat with two diesel engines.

On June 26, 1991, the M/V MAR-RAY sank in the Calcasieu Parish Ship Channel. Petitioner was on his third day of a fourteen day hitch. Petitioner had worked his shift and was in bed in the bunkroom of the M/V MAR-RAY at approximately 7:30 p.m. when he felt the vessel shift. In his underwear, petitioner went above and met the captain, Scott Guidry, who was coming from the wheelhouse to the lower deck. Guidry indicated they needed to leave the vessel since she was apparently going to sink. Petitioner climbed to the port side of the vessel, lowered himself into the water and swam approximately one hundred (100) feet to the M/V WOODRIVER EXPRESS, a nearby tugboat.[1] On December 4, 1991, petitioner testified that in connection with the above stated

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[1] In his statement taken the day after the incident, petitioner stated he swam fifteen (15) yards since the M/V MAR-RAY was attempting to moor along side the M/V WOODRIVER EXPRESS.

incident, he was skinned up and bruised a little, with no other physical injuries.[2]

Following the June 26, 1991 incident, petitioner did not work for five (5) days until he was reassigned by respondent to the M/V GUY VICK. After working on the M/V GUY VICK for two (2) days, petitioner was assigned to the M/V WOODRIVER EXPRESS as a pilot. Upon the completion of petitioner's fourteen day hitch, petitioner returned home. Petitioner contacted an attorney on his first seven (7) days home. At the time petitioner talked to an attorney, he had not seen a physician, psychologist or psychiatrist. On July 15, 1991, petitioner saw Dr. Nguyen, a psychiatrist who works for Charter Hospital, a psychiatric facility in Lake Charles, Louisiana. Petitioner was subsequently diagnosed with Post-Traumatic Stress Disorder and was admitted as a patient to Charter Hospital. Following his release from Charter Hospital, petitioner's psychiatrist and psychologist recommended that petitioner return to work on the boats, however, he has chosen to work as a car salesman.

[2] In his statement taken the day after the incident, petitioner emphatically stated he had no injuries. In the affidavit of Scott Guidry, Guidry stated that neither he nor petitioner had any injuries. It is undisputed in all the medical records that petitioner reported no physical injury.

REASONS FOR DENYING PETITION

I. THERE IS NOT A PROFOUND CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS IN REGARD TO THE LEGAL STANDARD TO BE APPLIED IN DETERMINING WHAT CIRCUMSTANCES GIVE RISE TO A CAUSE OF ACTION UNDER THE JONES ACT FOR EMOTIONAL INJURY

Petitioner contends that this Court should grant his Writ of Certiorari to resolve a conflict among the Circuit Courts of Appeals relative to Jones Act claims for emotional injuries. In support of this contention, petitioner relies on a comparison of *Gottshall v. Consolidated Rail Corporation,* 988 F.2d 355 (3rd Cir. 1993) and the instant cause. Petitioner states that *Gottshall* and the instant case "demonstrate a lack of uniformity and a clear conflict among the circuits." On the surface, petitioner's contention has some attraction. However, when the cases are closely examined, it becomes clear that the facts of these cases are so dissimilar that they cannot be said to be in direct conflict.

Respondent contends that both *Gottshall* and the case subjudice were decided by means of the precise application of developing legal principals in this area of law to the particular facts at hand. *Atchison, Topeka, and Santa Fe Railway Company v. Buell,* 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). Moreover, the instant case is not in conflict with other Circuit Courts of Appeals' decisions addressing the issue of when, and under what circumstances, a plaintiff may recover for purely emotional injuries under the Jones Act.

In *Gottshall v. Consolidated Rail Corporation*, 988 F.2d 355 (3rd Cir. 1993), the plaintiff was working as a member of a railroad workgang repairing track. The plaintiff and his fellow workers were working during a severe heat wave. Although the weather conditions were extreme and the workers complained repeatedly to their supervisor for breaks, the supervisor sped the men up, forcing them to work well beyond their usual pace, disallowing scheduled work breaks and discouraging unscheduled breaks. This was in direct contravention of Conrail's policy of slowing down in the face of extreme weather conditions.

After several hours working under these conditions, plaintiff's co-worker and close friend collapsed. The Conrail supervisor did not seek medical attention and ordered the plaintiff to cease assisting the stricken man and return to work. When the man collapsed a second time, plaintiff administered Cardiopulmonary Resuscitation to him for 45 minutes while the supervisor went for medical help. By the time the paramedics arrived at the work site, the man was dead. The supervisor then ordered the remaining men back to work. While the plaintiff and his fellow workers returned to work, the corpse lay in open view beside the track in the hot sun for over three (3) hours.

The following day, the plaintiff was reprimanded for administering CPR to the deceased and was sent back to work in the same extreme weather and working conditions. The plaintiff became increasingly frightened that he would die in the same manner as his fellow worker. A few days after the funeral, the plaintiff left work, went home and retreated into his basement where he was found several days later. The plaintiff was then admitted

to a psychiatric institution where he was diagnosed as suffering from major depression and post traumatic stress disorder. In addition to losing 40 pounds, Gottshall suffered suicidal preoccupations, anxiety, insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares of the death scene and fear of leaving his home. The Third Circuit, in *Gottshall,* held that the plaintiff could recover damages under the Federal Employers Liability Act (FELA) for negligent infliction of emotional distress.

Subsequently, the Third Circuit decided the case of *Carlisle v. Consolidated Railroad Corporation,* 990 F.2d 90 (3rd Cir. 1993). In *Carlisle,* plaintiff's emotional injuries were the result of longterm work-related stress. The plaintiff was required to work fifteen (15) hour days, from six (6) to thirteen (13) consecutive days at a time. In a two (2) week period the plaintiff worked in excess of 225 hours. Plaintiff's job responsibilities were overwhelming due to inadequate staffing and the pressure for perfect performance as a mistake on the plaintiff's part could result in substantial injury. In addition, the plaintiff was prohibited from taking breaks for lunch or rest and was verbally abused at work and at home by his supervisor who habitually called him at home in the middle of the night. The plaintiff was instructed by Conrail to ignore safety concerns such as poor maintenance or malfunction in the equipment which would cause delay.

In support of its opinion that the plaintiff's work-related stress was compensable under FELA, the Third Circuit cited the fact that two (2) government reports placed Conrail on notice of the dangers of the plaintiff's work place. Conrail had made no changes to the work

place as a result of the reports. The Third Circuit Court of Appeals held that emotional and physical injuries which are the foreseeable result of requiring workers to remain in unreasonably dangerous and stressful work conditions for significant periods of time can present a claim under the FELA.

In contrast to the Third Circuit cases, the petitioner, Brian Briscoe, was not subjected to any unreasonably dangerous and stressful work conditions for a significant period of time as was the plaintiff in *Carlisle*. Nor was the petitioner subjected to the callous disregard for human life and dignity, work-related stress and traumatic events, such as the plaintiff in *Gottshall*. In hindsight, the petitioner attempts to characterize the incident in question as traumatic and life threatening, however, this is simply not the case.

In his statement of the case petitioner states "[h]e feared the vessel would roll on top of him, preventing his escape and costing him his life." However, the record is absent of any evidence supporting petitioner's contention that he feared for his life during the incident in question. In the same vain, petitioner contends that he "was an active participant in an event that nearly cost him his life." There is no basis in the record or the undisputed facts to justify this statement. This is merely an example of petitioner's attempt to elevate his participation in the sinking of the M/V MAR-RAY to a "traumatic event" while, in fact, it was not traumatic.

Petitioner awoke in his bunkroom, realized that the M/V MAR-RAY was listing, went above, determined that the tug was going to sink, jumped into the water and

swam no more than 100 feet to a nearby tug. By his own admission, the petitioner suffered no more than a few scrapes and bruises. These facts hardly present the kind of traumatic and stressful conditions that the plaintiff underwent in *Gottshall* and *Carlisle*.

There is no real profound conflict between the Third Circuit cases and the instant one, rather, they were decided after careful thought and reasoning, based upon the facts and circumstances of each individual case. Petitioner asserts that if his case had been decided in the Third Circuit the outcome would have been different. However, respondent believes that had petitioner's case been decided in the Third Circuit, the outcome would have been the same because the factual circumstances in Briscoe do not provide the Third Circuit's required threshold assurance that there is a likelihood of genuine and serious emotional injury. *Gottshall* at 371.

Petitioner further contends that the Fifth Circuit's position on the issue of whether emotional injuries are recoverable under the Jones Act is in conflict with other federal circuits. The Fourth Circuit is undecided on the issue of whether an employee can recover under FELA for purely emotional injuries without additional physical symptoms. Based on *Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224 (4th Cir. 1990) it appears that if the Fourth Circuit did allow recovery for purely emotional injury it would require that there be a showing of "inconceivable abuse" or "outrageous conduct" as a threshold element of such a claim. This does not create a conflict between the Fourth and Fifth Circuits.

The Seventh Circuit's position, which is the most similar to the Fifth Circuit, is that in order for a plaintiff to recover for emotional injuries under the FELA, said injuries must result from physical contact or the threat of physical contact. *Ray v. Consolidated Rail Corporation*, 983 F.2d 704 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 914, 116 L.Ed.2d 813 (1992).

The Seventh Circuit's position does differ somewhat in that the Seventh would apparently allow recovery in the face of "the threat of physical contact". *Ray* at 705. However, the facts of the *Ray* decision, on which the petitioner relies, are so factually opposite from the facts in the instant case, that it can not be said that these decisions are in direct conflict.

Petitioner states "the Ninth Circuit standard has not yet been fully delineated, but recovery may be permissible if the purely emotional injuries have physical manifestations, such as a heart attack resulting from the stress." The Ninth Circuit cases on point involve accusations of drinking on the job and harassment which cause work-related stress resulting in suicide and paranoid schizophrenia. As in the Third Circuit, the facts of the Ninth Circuit cases, which have considered the issue of recovery for emotional injuries under the FELA are so factually opposite the facts *subjudice* it should not be argued that these decisions are in direct conflict. *Pierce v. Southern Pacific Transportation Co.*, 823 F.2d 1366 (9th Cir. 1987); *Taylor v. Burlington Northern Railroad Company*, 878 F.2d 1309 (9th Cir. 1986).

After review of the alleged conflict, it is clear that there are no real differences among the Circuit Courts of

Appeals in regard to the issue of whether, and if so, under what circumstances a plaintiff can recover for purely emotional injuries under the Jones Act. In fact, since the Court's decision in *Buell* there has not been sufficient litigation on this issue to determine whether there is a real conflict among the circuits. What is obvious is that the issue is not an easy one, and is being given consideration by several circuits. **This Court, however, should not be called upon to resolve a conflict among the Circuit Courts of Appeals unless and until the alleged conflict is clear and distinct.**

Petitioner also addresses the zone of danger theory several times in his Petition and alleges now for the first time that he was in the "zone of danger". Petitioner contends that the lower court's opinion eliminated the zone of danger theory for emotional injuries in the Fifth Circuit. Any discussion of the zone of danger theory is superfluous as the petitioner did not raise this issue before either the lower court or the Fifth Circuit. Thus, petitioner is foreclosed from arguing here, that he is entitled to recovery for emotional injury under the zone of danger theory. *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Petitioner's references to the zone of danger theory and whether the Fifth Circuit will recognize the same should not be considered.

Petitioner also mischaracterized the lower court's opinion by inserting the word "significant". Petitioner asserts that the lower court's holding is that "purely emotional injuries are not compensable absent accompanying physical injuries" and "the physical injuries must be **significant** and non trivial." (emphasis added) The lower court, relying on *Gaston, Plaisance,* and

Ainsworth held that the law in the Fifth Circuit is that a plaintiff suing for purely emotional injuries can recover only if he also suffered physical injuries. In addition, trivial physical injuries do not support recovery for emotional injuries. The lower court did not use the word "significant" in its opinion.

II. THE FIFTH CIRCUIT COURT OF APPEALS' AFFIRMANCE WITHOUT OPINION OF THE LOWER COURT'S DECISION WAS PROPER

The United States District Court for the Western Division of Louisiana decided a narrow, fact sensitive case in an opinion consistent with the Fifth Circuit Court of Appeals' established precedent. Petitioner asserts that this Court should grant a Writ of Certiorari on the basis that the Fifth Circuit affirmed the lower court's decision in an unpublished opinion. Additionally, petitioner contends that the Fifth Circuits' affirmance permitted a substantial modification of Fifth Circuit jurisprudence without discussion, all of which violated its own local rules.

Fifth Circuit Court of Appeals Local Rule 47.6 provides, in the case of summary judgment where no genuine issue of material fact has been properly raised by the appellant and the court determines that there was no reversible error of law and that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion. In the instant case, there was no genuine issue of material fact. Petitioner in his statement of the case to this Court states that "the

essential facts in this case are not disputed." Furthermore, a Fifth Circuit opinion would have no precedential value, for an opinion merely would have reiterated the Fifth Circuit's position as stated in its previous decisions of *Ainsworth v. Penrod Drilling Corporation*, 922 F.2d 546 (5th Cir. 1992), *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1992) and *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir. 1989). Rather than departing from the usual course of judicial proceedings, the Fifth Circuit merely applied its established jurisprudence to the undisputed facts of the instant cause. Thus, there was no need for the Fifth Circuit to render an opinion or publish the same.

Petitioner attempts to show that the *Briscoe* decision is a substantial modification of Fifth Circuit jurisprudence. Petitioner goes so far as to classify the Fifth Circuit's position as "the new Fifth Circuit standard." To the contrary, petitioner's reliance is based upon insignificant and immaterial points that have little, if any, impact upon the Fifth Circuit's position in regards to, if, and under what circumstances, a Jones Act plaintiff can recover for purely emotional injuries. The Fifth Circuit's affirmance of the lower court's opinion does not establish a new rule of law, alter or modify an existing rule of law.

It is clear that petitioner has not demonstrated that the lower court's opinion substantially modified Fifth Circuit jurisprudence, that the Fifth Circuit violated its own local rules or that the Fifth Circuit has so far departed from the accepted and usual course of judicial proceeding that review by this Court is appropriate.

CONCLUSION

Petitioner suggests that as six years have passed since this Court's decision in *Buell*, the Court should resolve the issue of whether and/or under what circumstances, recovery for purely emotional injuries will be allowed under the FELA or the Jones Act. Respondent suggests, it is not the number of years that have passed since the *Buell* decision that should control the Court's decision, but rather, whether there is indeed a real conflict among the Circuit Courts of Appeals which this Court should resolve. It is respondent's position that there is not an actual and/or real conflict among the circuits.

For this and all the foregoing reasons, respondent, DeVall Towing & Boat Service of Hackberry, Inc. respectfully requests this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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